Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	MM Docket No. 93-165
	)	
Amendment of Section 73.202(b),	)	RM-8247
Table of Allotments,	)	
FM Broadcast Stations,	)	
(Athens, Ohio)	)	

To: The Commission

APPLICATION FOR REVIEW

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November 20, 1995

SUMMARY

David A. Ringer ("Ringer") hereby submits his Application for Review of the Policy and Rules Division's Memorandum Opinion and Order, DA 95-2118, released October 12, 1995 ("MO&O"). Mr. Ringer had sought reconsideration of the Division's earlier decision to open a second filing window for the new FM station at Athens, Ohio. In his Petition for Reconsideration,, Mr. Ringer argued that the initial window for Athens had expired, that he had filed an application for the new facility and that no additional window was warranted.

In its MO&O, the Division rejected Mr. Ringer's arguments. The Division concluded that the initial Athens window had been suspended when the Commission issued its Public Notice, FCC 94-41, on February 24, 1994. The Division contends that, as a result of the Commission release of its Public Notice, all previously announced FM windows were "suspended." In his Petition for Reconsideration, Mr. Ringer had demonstrated that the Commission's Public Notice was not published in the Federal Register so it had no such legal effect. In addition, Mr. Ringer argued that the language of the Public Notice was unclear. It was not possible to discern from a plain reading of the Public Notice whether the Commission would continue to accept applications for windows that were previously announced before the Commission freeze or whether those applications would be returned. Since the Public Notice was unclear on this crucial point, Mr. Ringer relied on the clear language of the Report and Order which announced the initial Athens window and which was never rescinded.

The Division argues that the language of the Commission's Public Notice was clear and that the Athens window was suspended. Mr. Ringer again demonstrates that

the Public Notice was so confusing that members of the communications bar and the Commission's own staff gave conflicting opinions as to whether applications would be accepted for previously announced windows. This evidence demonstrates that a reasonable person could not have understood the Commission would not accept applications during the initial Athens window.

The Division also argues that Mr. Ringer has not shown that a second Athens window has prejudiced himself. To the contrary, Mr. Ringer demonstrates that he has been unfairly prejudiced by the opening of a second Athens window since he will now have to expend additional time and money to litigate against the additional applicants. Furthermore, the presence of additional applicants has complicated the resolution of this proceeding and further delayed institution of service to the public. Mr. Ringer respectfully requests that the Commission reverse the Division's MO&O and rescinded its previous Order wherein it opened the second Athens window.

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To: The Commission

APPLICATION FOR REVIEW

David W. Ringer ("Ringer"), by and through counsel, and pursuant to §1.115 of the Commission's Rules (47 C.F.R. §1.115), hereby submits his Application for Review of the Memorandum Opinion and Order, DA 95-2118, released October 12, 1995, ("MO&O") by the Policy and Rules Division of the Commission ("Division"), in the above-captioned rulemaking proceeding.[1] In support whereof, the following is shown:

Background

The main issue of this proceeding is whether the release of the Commission's Public Notice, FCC 94-41, on February 24, 1994 ("Public Notice"), effectively froze the pending window for new FM station at Athens, Ohio or whether the Public Notice had no such effect given the fact that it was never published in the Federal Register and its language was insufficiently clear. In its MO&O, the Division argues that, irrespective of whether the Public Notice was published in the Federal Register, Mr.

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[1] This Application for Review is timely-filed pursuant to §1.4(b) and §1.115 of the Commission's Rules within 30 days of the publication of the MO&O in the Federal Register on October 18, 1995 (60 F.R. 53878). The original due date for the filing would have been November 17, 1995, however, due to the Federal government shutdown, the filing date was postponed until today.

Ringer had actual and timely notice of the Public Notice. MO&O at ¶5. The Division claims that the language of the Public Notice was clear that the Commission was freezing all pending FM windows. As Mr. Ringer will demonstrate, the fact that the Public Notice was never published meant that it had no effect on pending FM windows. Furthermore, the Public Notice was so confusing that a reasonable person could not have understood that the Commission would not accept applications for previously-announced windows.

The Division first opened a window for the new FM station at Athens, Ohio, on January 25, 1994, when it issued a Report and Order, DA 93-1584, in MM Docket No. 93-165 ("Report and Order"). The window was opened from March 11, 1994, to April 11, 1994. After the release of the Report and Order, on February 25, 1994, the Commission issued its Public Notice. In that document, the Commission stated that it was "holding in abeyance the processing of applications and the adjudication of hearing proceedings involving mutually exclusive proposals for new broadcast facilities in light of the opinion of the United States Court of Appeals for the District of Columbia in Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993)." The Commission stated that, since the Court had invalidated its method for selecting between mutually exclusive broadcast applications, it was freezing all broadcast hearings and the processing of applications for new stations. The Commission added that "...during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities.... "[A]ny such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze." The Public Notice did not specifically define the term "suspended." It was unclear whether the

Commission would continue to accept applications for windows announced prior to the freeze or whether such applications if filed, would be returned. The Commission's Public Notice was never published in the Federal Register.

Shortly after the release of the Public Notice, and prior to Mr. Ringer filing his application, undersigned counsel and another communications counsel sought a declaratory ruling from the Commission on the issue of whether open window filing periods had been cancelled or postponed. See Exhibits A and B. Lauren Colby, Esq., a communications counsel, filed an "Emergency Petition for Declaratory Ruling" on March 2, 1994, and undersigned counsel filed "Comments in Support of Emergency Petition for Declaratory Ruling" on March 2, 1994. In his Emergency Petition, Mr. Colby related that:

> A sharp debate has arisen amongst communications counsel concerning the meaning of the [Public Notice]...There is...broad confusion concerning the meaning the word 'suspended' as applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms 'canceled' or 'postponed' do not appear in the official announcement).
>
> Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

Exhibit A at p. 2.

Mr. Colby stated further that: "It is urgent that this matter be clarified" and that "[I]ssuance of a ruling will be beneficial...to a considerable number of persons, who have commissioned the preparation of applications which were to be filed under the windows currently announced, and who have no idea whether to proceed with these applications or no." Exhibit A. The Commission never acted on Mr. Colby's request or sought to clarify these important matters before the Athens window expired.

Since the Public Notice was not sufficiently clear on the definition of the term "suspended," and since the Division's earlier Public Notice clearly stated that applications for the new Athens FM station must be submitted on or before April 11, 1994, Mr. Ringer prepared and filed an application for Athens on April 11, 1994. Three other parties[2] also filed applications for the new Athens FM station. Numerous other parties filed applications for the other windows that had been announced prior to the imposition of the freeze. Mr. Ringer's application was accepted for tender but was later returned by the Audio Services Division on December 15, 1994. See, Letter to Smithwick & Belendiuk, P.C., Ref: 1800B-JRC, released December 15, 1994. Mr. Ringer has separately sought reconsideration of the return of his application.

On November 23, 1994, the Division issued an Order, DA-94-1270, wherein they opened a second window for Athens, Ohio, as well as other communities. The Division stated that the filing of applications for these communities had been suspended by the Commission's Public Notice and, since the Commission had later

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[2] The other applicants were Esq. Communications, Inc., File No. BPH-940411MB; William Benns, IV, File No. BPH-940411MC; and Lakeside Broadcasting, Inc., File No. BPH-940411MG.

modified its freeze, the Division was opening a new window for each of the communities.

On December 5, 1994, Mr. Ringer filed a "Petition for Reconsideration of the Division's Order" and "Motion for Stay" arguing that the initial Athens window was not frozen or suspended since the Commission failed to publish the Public Notice and its language was not clear. Since the initial Athens window was never frozen, Mr. Ringer argued that the Division should not have opened a second window. In his Motion for Stay, Mr. Ringer argued that the Commission should stay the second Athens window while it reconsider its action in this case. Mr. Ringer demonstrated that he would suffer irreparable harm if a second window was opened, that he was likely to prevail on the merits of his petition for reconsideration, and that neither other parties to the proceeding nor the public interest would be harmed if the second window was stayed. The Allocations Branch failed to take timely action on Mr. Ringer's Motion for Stay and the second Athens window expired. There are now seven applicants for the new FM station at Athens, Ohio.

In its MO&O, the Division argues that the original filing window was "effectively suspended." MO&O at ¶7. The Division contends that the Commission's Public Notice "quite obviously meant that cutoff lists or orders establishing filing windows that were adopted prior to the freeze were suspended." MO&O at ¶5. The Division argues that Mr. Ringer has "provided no reasonable alternative interpretation of the plain wording of the Public Notice. The Division discounts the fact that communications counsel and Commission staff members were confused as to the intent

of the Public Notice. The Division claims that Mr. Ringer's confusion, "as well as that of the other practitioner, were of their own making and do not afford a basis for reconsideration." Id.

The Division also claims that Mr. Ringer is not prejudiced "by the freezing of the original filing window and establishment of a new window." MO&O at ¶6. The Division claims that Mr. Ringer "had no right to expect that it would have to face only those applicants that filed during the frozen original filing window." The Division argues that other parties that filed during the second filing window would be prejudiced and suffer harm if it reconsidered whether to open a second window and dismissed the subsequently filed applications.

Issues to be Presented

1. Whether the Policy and Rules Division erred by finding that the Commission's Public Notice effectively suspended the original Athens filing window and erred by opening a second Athens window?

2. Whether the Policy and Rules Division erred when it found that Mr. Ringer was not prejudiced by the opening of a second Athens window?

The Public Notice Was Never Published and Did Not Provide Notice That The Athens Window Was Suspended

By failing to publish its Public Notice in the Federal Register, the Commission failed to provide legal notice that the pending Athens window was suspended. The Report and Order that opened the initial Athens window was published in the Federal Register and clearly stated that applications must be filed by April 11, 1994. That Report and Order was never rescinded or suspend by the Commission or the Division. The Division brushed these important facts aside when it denied Mr. Ringer's Petition

for Reconsideration. However, the Division ignores the important tenets of the Administrative Procedure Act which requires that formal notice be given of agency actions. Without such notice, an agency's action can have no effect on any party that would be adversely affected by it. Section 552(a)(1) of the Administrative Procedure Act specifically states:

> ...Each agency shall separately state and currently publish in the Federal Register...rules of procedure...substantive rules of general applicability...and each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published....

5 U.S.C. §557(a)(1)(C)-(E).

The Division does not dispute that the release of the Public Notice, which purported to suspended the Commission's FM processing rules which govern the acceptance of applications for new FM stations, was a temporary suspension to a set of procedural rules that would have required publication in the Federal Register. See, Kessler v. FCC, 1 RR 2d 2061 (D.C. Cir. 1963)(freeze on filing of AM applications deemed a change in procedural rules requiring publication). The Division argues that such publication is irrelevant on the question of whether the Commission's Public Notice effectively suspend the pending Athens window, since Mr. Ringer had "actual notice" of the Commission's action.

The Commission's Public Notice was not a clear pronouncement that it would not accept applications for previously-announced FM windows. Without such "actual notice" and given the Commission's failure to publish the February 25, 1994 Public

Notice, it is not possible to conclude that notice of the Commission's intended action was ever provided. The Commission's Public Notice did not specifically state that applications for previously-announced windows would not be accepted. Had the Commission meant to prohibit the filing of applications, the language of its Public Notice should have been clearer. Instead, the Commission issued a confusing Public Notice that failed to specifically define the term "suspended."

Without actual notice that applications could not be filed for the previously-announced Athens window, Mr. Ringer relied on the more succinct language contained in the Commission's earlier Report and Order which announced a specific window period and he submitted his application in good faith. No additional window filing period should have been permitted since the general public had complete and uncontradicted notice that applications for the new Athens station must be filed on or before April 11, 1994.

While the Commission is not required to make the clearest possible articulation of a proposed action or change in policy, it must, however, be shown that, based upon a fair reading of a Commission order, parties "knew or should have known what the Commission expected of them." McElroy v. FCC, 72 RR 2d 1034, 1038 (D.C. Cir. 1993). The Division claims that a fair reading of the Public Notice shows that the Commission intended to suspend pending FM windows and that applications could not be filed at that time. However, this interpretation of the Public Notice is not valid. The test of whether a Commission interpretation of an earlier pronouncement is valid is whether the pronouncement was "reasonably comprehensible to [people] of good

faith." McElroy v. FCC, 72 RR 2d at 1038, citing, Kansas Cities v. FERC, 723 F. 2d 82, 86 (D.C. Cir. 1983). If the Commission's order suffers from a "lack of clarity," and its effect is not clear, the question is then what the parties "'justifiably understood' and whether anything in the order 'made it apparent that the Commission meant otherwise.'" Id, citing, Maxcell Telecom Plus, Inc. v. FCC, 815 F. 2d 1551, 1558 (D.C. Cir. 1987), quoting, Bamford v. FCC, 535 F. 2d 78, 82 (D.C. Cir. 1975).

In this case, the Commission's Public Notice, suffered from such lack of clarity that it was not possible to adequately discern that the Commission would not accept applications filed during the previously-announced windows. As outlined above, members of the communications bar and the FCC's own staff could not even discern the meaning of the Commission's Public Notice. This is clear evidence that the Commission's Public Notice was not sufficiently clear as to provide actual notice that applications would not be accepted.[3] While communications counsel sought a clarification from the Commission, no such clarification was given. Therefore, it was reasonable for Mr. Ringer, and others, to believe that the Athens window, which had already been announced by the Commission and was set to open within a short period

[3] The Allocations Branch states that "the Commission speaks through its official documents and records and petitioner (MR. Ringer) could not have relied on staff opinions in any case." MO&O at ¶5 at footnote 11. However, Mr. Ringer does not contend that counsel relied upon the opinion of the Commission's staff in deciding whether Mr. Ringer should go forward and file his application. To the contrary, the Commission staff gave differing views and it would have been impossible to rely upon them. The evidence of the staff's differing views simply serves to demonstrate that the Commission's Public Notice was confusing to the general public and even to the Commission's own staff members.

of time, was still valid and would be the only opportunity for filing applications for the new station. For the Division to argue, in hindsight, that the Commission's Public Notice said something more, is an exercise in the "forbidden sin of post hoc rationalizations" that must not be permitted. Reuters Limited v. FCC, 781 F. 2d 946, 951 (D.C. Cir. 1986). The Commission should recognize the Allocations Branch's error, reverse its decision in this case, and invalidate the second Athens window.

A Second Window Filing Period Has Prejudiced Mr. Ringer

The Division erroneously concluded that Mr. Ringer was not prejudiced when it opened it second Athens window. To the contrary, by opening a second window, the Allocations Branch has permitted other parties a "second bite at the apple" to belatedly file for the new Athens station. This has unfairly prejudiced Mr. Ringer who must now expend additional time and money to litigate against the additional applicants. Furthermore, the presence of additional applicants has served to complicate the resolution of the Athens proceeding and further delay the institution of new service to the public. This action has harmed not only Mr. Ringer's interest but the public interest as well.

The Division claims that Mr. Ringer "had no right to expect that [he] would have to face only those applicants that filed during the frozen original filing window." MO&O at §6. To the contrary, Mr. Ringer had every right to expect just that. Mr. Ringer relied on the succinct language of the Report and Order which set forth a specific window filing period for Athens. Mr. Ringer reasonably believed that this would be the one opportunity for parties to file applications for the new Athens

station. The Division argues that other parties that withheld filing their applications in the first Athens window "understandably would not have expressed their interest during the freeze period." MO&O at ¶6. The Division argues that those potential applicants would be prejudiced if the second Athens window is invalidated. However, those applicants voluntarily chose to ignore the clear language of the Report and Order and to gamble that the Commission would open a subsequent Athens window. Their prejudice is of their own making. Mr. Ringer, on the other hand, reasonably relied on the clear notice contained in the Report and Order. To permit a second Athens window would unfairly prejudiced Mr. Ringer who followed the Commission's only clear pronouncement in this case.

Conclusion

In its Report and Order, in MM Docket No. 93-165, the Commission gave specific notice that anyone interested in filing for the new FM station on Channel 240A at Athens, Ohio, do so on or before April 11, 1994. The subsequent release of the Commission's Public Notice failed to give notice, actual or constructive, that the Commission would not accept applications filed during the previously-announced window. The window filing period passed and Mr. Ringer filed his application. No additional window is necessary or justified in this case. To permit additional filings would be unfair to Mr. Ringer and contrary to the public interest.

WHEREFORE, the above-premises considered, David W. Ringer, respectfully requests that the Divisions Branch's Memorandum Opinion and Order, DA 95-2118,

released October 12, 1995, be **REVERSED** and its Order, DA 94-1270, released November 23, 1994, be **RESCINDED.**

Respectfully submitted,

DAVID A. RINGER

By: _____
Arthur V. Belendiuk
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His Attorneys

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November 20, 1995

dlf\ATHENS\APPREV

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
FREEZE ON COMPARATIVE HEARINGS	)	FCC 94-41
	)	
TO: General Counsel	)	
	)	

EMERGENCY PETITION FOR DECLARATORY RULING

Lauren A. Colby, attorney at law, on behalf of certain clients,[1] hereby respectfully requests the General Counsel to immediately issue a declaratory ruling clarifying certain aspects of the freeze on comparative hearings announced on February 25, 1994, (FCC 94-41). In support thereof, it is alleged:

1. On February 25, 1994, the Commission announced a freeze on comparative hearings. At page 2 of the announcement, the following language appears:

> "Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees. . . Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze".

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[1]It would be inappropriate to identify the clients on whose behalf this petition is being filed, because it would reveal client confidences, i.e., the intention of certain clients to file applications within the window periods which have been announced by the FCC.

2. A sharp debate has arisen amongst communications counsel concerning the meaning of the above quoted provisions. Most counsel agree that the Commission did not intend to prevent the filing of applications which are in conflict with a renewal application, because the Commission apparently would have no legal authority to do so. Similarly, it would appear that, where a "first come, first served" FM window is open, the freeze would not be applicable, because anyone filing for that window would presumably face no comparative hearing. There is, however, broad confusion concerning the meaning of the word "suspended" as applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms "canceled" or "postponed" do not appear in the official announcement.

3. Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

4. All of this puts the communications bar in a very difficult situation. If we advise clients that all of the pending

windows have been closed; tell a client not to file an application; and someone else files an application which is accepted, we will have given bad advice. If, on the other hand, we tell a client to file an application and the Commission returns the application and keeps the filing fee, we will have given very bad advice.

5. It is urgent that this matter be clarified. Furthermore, because there are at least two FM windows which are currently open and will be closing within 14 days, it is urgent that the matter be clarified in writing just as soon as possible.

6. The undersigned respectfully requests the General Counsel to issue a further ruling, clarifying these matters. If the General Counsel is unable to do so without consulting with the full Commission, the undersigned respectfully requests that such consultation take place, so that a ruling may be issued. Issuance of a ruling will be beneficial, not only to the communications bar, but also to a considerable number of persons, who have commissioned the preparation of applications which were to be filed under the windows currently announced, and who have no idea whether to proceed with those applications, or not.

Respectfully submitted,

March 2, 1994

LAUREN A. COLBY

By: _____
Lauren A. Colby
Attorney

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Frederick, MD 21705-0113

EXHIBIT B

Before the

Federal Communications Commission

Washington, D.C. 20554

On the Matter of	)	
	)	
FREEZE ON COMPARATIVE HEARINGS	)	FCC 94-41
	)	

TO: General Counsel

COMMENTS IN SUPPORT OF EMERGENCY PETITION FOR DECLARATORY RULING

The law firm of Smithwick & Belendiuk, P.C. ("S&B") hereby respectfully submits its comments in support of the "Emergency Petition For Declaratory Ruling," filed by Lauren A. Colby, Esq., on March 2, 1994. In support whereof, the following is shown:

1. Mr. Colby's Petition addresses important issues concerning the Commission's recent "freeze" on comparative hearings and the filing of applications for new FM stations, as outlined in its Public Notice, FCC 94-41, released February 25, 1994. S&B also represents numerous clients that will be affected by the Commission's action. S&B supports Mr. Colby's Petition and hopes that the Commission will take this opportunity to more clearly explain its proposed freeze and what proceedings and/or filings it will affect.

2. In addition, S&B believes that there are two other areas that the Commission's Public Notice did not clearly address. First, in one paragraph of the Public Notice, the Commission states that "...hearing proceedings (except those aspects of hearing proceedings not involving comparative analysis of new applicant's proposals) will be suspended." Public Notice at p. 1 (emphasis added). This would

appear to say that parties in a comparative hearing are free to pursue basic qualifying issues against other applicants and that such issues may continue to be litigated. In fact, the Commission states that, where an issue has been added or a case remanded on a basic issue, the proceeding will be permitted to go forward. Public Notice at p. 2. However, the Public Notice does not address the situation where a qualifying issue was not added or requested prior to February 25, 1994. The question remains whether, during the freeze, parties are required to file Motions To Enlarge Issues based upon "newly-discovered evidence" within the 15 day deadline specified in §1.229(c) of the rules or whether such deadlines have been stayed until the freeze is lifted. Additionally, the Public Notice does not address whether a party who is the subject of a Motion To Enlarge raising basic qualifying issues that was filed before the Commission's freezes, is required to submit its Opposition and the Movants Reply by the deadline outlined in §1.294 of the rules, or whether such deadlines are also stayed.

3. In addition, the Commission's Public Notice states that during the freeze the Mass Media Bureau will not "issue cutoff lists or...require the filing of....hearing fees." Public Notice at p. 2. However, the Public Notice does not explain whether those parties with applications that appeared on a cutoff list issued before the freeze who are facing an upcoming hearing fee payment deadline are required to make the hearing fee payment or whether the freeze has stayed this requirement.

4. Should the Commission choose to consider Mr. Colby's Petition, S&B believes it should also quickly address these other important questions.

WHEREFORE, the above-premises considered, the law firm of Smithwick & Belendiuk, P.C., hereby respectfully requests that the Commission issue a Declaratory Ruling concerning its Public Notice, FCC 94-41, as outlined herein.

Respectfully submitted,

SMITHWICK & BELENDIUK, P.C.

By: _____

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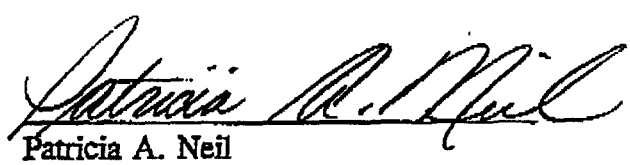
March 2, 1994

PN/GSS/FREEZE.COM

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 2nd day of March, 1994, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113



Patricia A. Neil